United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-6104

B

P/S

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-6104

ALFRED KIRSHNER
98 Van Cortlandt Park South
Bronx, New York 10463
Phone: 212 543 9038

Plaintiff-Pro Se
Appellant

VS

UNITED STATES OF AMERICA
SECRETARY OF THE TREASURY
COMMISSIONER OF I.R.S.
ALVIN D. LURIE in his capacity
as Asst. Commissioner
Employer Plans & Exempt
Organizations. I.R.S.
c/o U.S. Attorney Civil Division
1 St. Andrews Plaza, 5th Floor
New York, New York

BERNARD GOLDBERG
REUBEN MITCHELL
JOSEPH SHANNON
ROBERT CHRISTEN
VICTOR CONDELLO
HARRISON GOLDIN
JAMES REGAN
Individually as Trustees of Teachers Retirement System
of City of New York, 40 Worth Street, New York, N.Y.

Isaah Robinson
110 Livingston Street, Brooklyn, New York
Individually as Former Trustee, "TRS".

Defendants-Appellees

REPLY
BRIEF FOR
PLAINTIFF-APPELLANT

TO BRIEF FOR

FEDERAL DEFENDANT-APPELLEES

UNITED STATES COURT OF APPEALS
FILED
OCT 31 1977
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CONSTITUTIONALITY OF PL 94-236

Federal Defendants err in asserting that PL 94-236 is constitutional.

Responding to Federal Defendants (hereafter F.D.) arguments in support of Court below finding that:

"...plaintiff's equal protection attack on PL 94-236 must fail since the legislation has a reasonable relationship to the legislative goal, i.e. the fiscal preservation of the City of NY".

Plaintiff submits that there is NO rational relationship between the Teachers Retirement System (hereafter TRS) a City employee pension/savings/investment trust and the fiscal preservation of the City of N.Y. . If the fiscal preservation of N.Y. City was the purpose of TRS then the TRS Trustees acts would be rational. But the purpose of TRS is the payment of pensions which has nothing to do with i.e. no relationship with the fiscal preservation of N.Y.City.

26 USC 401/503 passed by Congress in 1938 established the protective investment policies for pension funds seeking tax exemption. 401 established the exclusive benefit for beneficiaries rules and 503 the prohibited transactions rules. IRS regulates the laws as administrative agency. It has registered more than 600,000 pension systems under 401 similar to TRS, with approximately 40 million members similarly situated to TRS members, with lifetime savings and investments of more than $300 billion.

To arbitrarily classify the five NY City employee pension funds out of 600,000 as excluded from the protection of 26 USC 401 shared by all the others in like situation is a prima facie violation of the equal protection requirement of reasonable classification. There is no precedent for the PL 94-236 classification.

CITATION

"Statutory discrimination must be based on differences that are reasonably related to the purposes of the act in which it is found."

Morey v Doud 354 US 457

There is no rational relationship between TRS and the fiscal preservation of NY City.

The legislative history of 26 USC 401 & 503 prove that these laws were passed specifically to prevent just such a relationship. Previous experiences and repeated abuses showed the need for pension systems protection from employers. In fact the bankruptcy of the Studebaker Co. and the consequent bankruptcy of its employee pension fund led to the passage of ERISA. ERISA prohibits investment in employer securities above 10%.

PL 94-236 by suspending application of 26 USC 401/503 only for TRS/City employee pension funds destroyed their Federal prudent man rule protection which they had enjoyed since 1940 when they registered with IRS. This invidious discriminatory, exclusory arbitrary classification is in violation of their equal protection rights under the 5th Amendment and establishes an unreasonable relationship with the fiscal preservation of NY City.

CITATION

A taxing act which shows oppressive discrimination denies equal protection.

Welch v Henry 305 U.S. 135

There is no rational relationship between TRS pension/savings/investment trust and the fiscal preservation of NY City because the forced relationship arbitrarily and inevitably destroys TRS' retirees formerly fully funded trust by replacing 56.5% of its sound corporate assets with bonds of insolvent NY City which are illegal for purchase under federal law, by all National and FDIC banks.

A leading U.S. pension investment authority Roger Murray in "Economic Aspects of Pensions" says:

> Limitations on the purchase of employer securities in private funds have long been recognized on the grounds that collateralizing a promise with the promisor's evidence of debt or a share in its equity is no security at all. At the same time, this type of limitation seeks to prevent use of the pension fund for purposes of control, support of the market for employer securities, facilitating acquisitions or control of other companies, and in other ways transforming the fund into an agency for purposes other than its intended one, the funding of pension commitments.

This authoritative summary of the primary pension investment goal underlines the basic conflict between city employee pension fund classification and the state goal of fiscal preservation of the City of NY.

PL 94-236 classification is not reasonable because it puts an unfair share of the risk of NY City bankruptcy on TRS retirees by destroying the fully funded character only of TRS/city employee pension funds out of 600,000 registered with IRS in like situation. Thus violating their equal protection rights under the fifth Amendment.

CITATION

> "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Royster Guano Co. v Virginia 253 U.S. 412

PL 94-236 is unconstitutional because it does not justify its invidious discriminatory classification of TRS/5 city employee pension trusts relationship to the state goal of fiscal preservation of NY City.

No evidence is given to support the bare assertion that the five NY City employee pension funds have a rational relationship with the fiscal preservation of NY City.

The bill itself does not even state that as a fact. The assertion is found only in the opinion of the Court below. The bill itself gives as its rationalization the supposed benefits to the pension beneficiaries. The rationalization is completely invalid as the examination below proves:

The goal identified by Congress (the State in this instance) in PL 94-236 is given as:

> (2) on or after August 20, 1975, and before January 1, 1979, considers, for purposes of determining investments to be made by the plan or trust, the extent to which such investments will—
>
> (A) maintain the ability of the city of New York—
>
> (i) to make future contributions to the plan or trust, and
>
> (ii) to satisfy its future obligations to pay pension and retirement benefits to members and beneficiaries of such plan or trust, and
>
> (B) protect the sources of funds to provide retirement benefits for members and beneficiaries of the plan or trust; or

The PL 94-236/"Agreement obliging TRS to buy $860 million NYC bonds is completely at variance with the specific purposes identified in paragraph (2) above:

Considering each item in (2) above:

(i) The city makes no"contributions" whatsoever to the fully funded pension trust of the retired teachers from which i.e.92% most/of the $860 million is being siphoned.

(ii) The city has no"future obligations to pay...benefits" to retirees. This is the exclusive obligation of their fully funded trust. If TRS goes bankrupt the city has no obligation to pay pensio as

(B)The city has nothing to do with "protect(ing) the sources of funds to provide retirement benefits". That is the job of the Trustee & IRS. PL94 236 authorizes the dissipation of the sources by removin the protection of 26 USC 401/503.

On the grounds above, plaintiff submits that no rational connection exists between the five City employee pension funds and the fiscal preservation of the City of N.Y. and therefore PL 94-236 is unconstitutional.

Alternative Suspect Classification.

A law treating five city employee pension funds differently from all others establishes them as a Suspect Classification.

Selling sound corporate bonds at a loss and buying Caa rated NYCity bonds above market price are illegal prohibited transactions which TRS Trustees would not contemplate BUT FOR PL 94-236. These practices destroy TRS' full funding structure in an arbitrary, discriminatory and unreasonable way.

Full funding guarantees the FUNDAMENTAL RIGHT of a pensioner, who has made a lifetime savings/investment in TRS, to a pension for life.

35% of TRS pensioners are over 75 years old; 87% are over 65; 35% receive less than $4,000. a year; the average for all TRS pensioners is $6,700. a year.

Pensions are essential for survival for the aged, ill, unorganized, politically powerless, voiceless Pensioner Minority of TRS. To receive a pension for life is a FUNDAMENTAL RIGHT after retiring with full funding as was the case for all TRS pensioners. Many contributed from 30 to 50% of the full funding assets of their individual accounts. The balance came from the City as deferred wages. These pensions are essential for survival for many especially the oldest and neediest since they retired without Social Security coverage. They are too old to work. They are entitled to a secure old age.

Since no scientific proof has been offered to show any connection between the suspect classification and invidious discriminatory treatment of the five city employee pension trusts and the goal of fiscal preservation of the City of NY there is no justification for the denial of equal protection and therefore PL 94-236 is unconstitutional.

CITATION

Where the state attempts to justify such action "as a rational means for the accomplishment of some significant state policy [it] requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy." Carey v. Population Services International, ___ U.S. ___ (1977), 45 L.W. 4601, 4606.

LEGISLATIVE HISTORY

Federal Defendants Counsel/properly emphasizes the weight and importance due to comments in the House debate on the bill by the Chairman of the House Ways and Means Comm. which sponsored the bill and held the only hearing on it. But he did not address himself to Mr. Ullman's remarks reproduced from the Congressional Record on page 40 of Plaintiff-Applicant's Brief.C.R. quotes him as stating that the 5 Pension Funds would not buy the NYC bonds unless the prohibited transaction & exclusive benefit rules were waived for them, "Then, the banks do not need to make their purchase if the pension funds do not, and this would mean an end to the whole plan for the sale of the NYC bonds." (Underlining added.)

This was a materially misleading statement because the "Agreement" provided for absolutely NO purchase of city bonds by the banks. All the buying ($2½ billion NYC bonds) was to be done by the 5 Pension Funds with no consideration in exchange. Also concealed from Congress was the fact that these same banks had unloaded $2½billion NYC obligations in the

on p.19

previous two years and had prohibited their fiduciary pension accounts from buying NYC bonds a year earlier; that NYC bonds were rated Caa by Moody's and therefore illegal for purchase by all National, or FDIC banks in the USA.

The damage done was compounded by Mr. Ullman's status as Chairman of the House Ways & Means Comm; he is one of the most influential & credible members of the Congress.

Mr. Ullman's misconception of the terms of the Agreement/PL 94-236 Bill can be accounted for by the fact that not one of the 90,000 City employee retirees or other opponent was informed of or present at the House hearing on the bill, to point out this and other glaring inconsistencies . Consequently it was passed unconstitutionally without a full or fair hearing, without a single opponent heard at the House hearing.

CITATION

> "What persons may be regarded as 'authorative' is equally well established by numerous cases that have addressed this question. The sponsor of the legislation...the members of the congressional comm. which holds hearings on the proposed legislation...and particularly the chairman of such a comm. are regarded as persons whose views, when expressed in the floor debates prior to passage of the legislation are entitled to particular deference. (underlining added)
>
> U.S. v Oates. Dkt. No.76-1100, slip op. 6436 n 26 (2d Cir.Jun1977)

"The legislative judgment is presumed to be supported by facts known to legislature, unless facts judicially known or proved preclude that possibility". Egan v US 137 F2d 369.

Denial of notice of hearing and opportunity to be heard is a violation of due process.

Mullane S.Ct. 1950

Federal Defendants erred in asserting p.15,"Even if plaintiff were to demonstrate some injury, some deprivation of property, it is quite difficult to trace its cause to the challenged statute."

The following will trace the cause step by step to the challenged statute:

Introduction: July 1,1975 TRS had 8% of its funded assets in NY City obligations.

1. The N.Y.Teacher , UFT publication, of Oct 26,1975 (Plaintiff's Appendix E, Exhibits E 1 & 2) Headline TEACHERS SAVE NYC. Lead article reports TRS Teacher Trustees voted to buy $150 million MAC bonds in addition to the $138 million bought shortly before.. TRS Trustee Mitchell is quoted " We are concerned because we must watch that our investments are properly diversified, that all our eggs aren't put in one basket." (Added comment in parentheses) (City obligations now 24% of assets.) UFT President Shanker is quoted, "It was blackmail." "little more than extortion." "Teachers will give no more of their pension monies, and we have a commitment (in writing) that we will not be asked to."

2. The N.Y.Teacher, Nov. 2,1975 issue. HOW SAFE ARE OUR PENSIONS? Plaintiff's Appendix E, Exhibit E 5. Author:TRS Trustee Mitchell. "The fixed reserves are invested in a diversified portfolio of bonds chiefly corporate bonds, with no less than an A rating."

3.On Nov. 26,1975 the "Agreement",(PApp.E,Ex I 1,2.3.) was approved by TRS Trustees. In it they agreed to purchase an additional $860 million NYCity bonds at that time rated Caa, illegal for purchase by 14,400 National and FDIC banks. BUT the purchase was to be made only on satisfaction of two conditions:

> Agreement paragraph 7 e iii"a state law satisfactory to Trustees" "containing provisions with respect to the legal status...of Trustees..."."shall be effective."

Agreement paragraph 7 e vi "the IRS shall have ruled or the Congress of the U.S. shall have provided that such purchase of obligations by the pension Funds ..."

(e) The obligations of the Pension Funds to purchase bonds pursuant to this Paragraph 7 shall be subject to agreement to and fulfillment of such agreements by all parties referred to in this Paragraph 7 and shall be conditioned upon each of the following facts being true on the date of each such purchase: (i) ~~the City shall have timely~~ ~~the Emergency Financial Control Board,~~ (vi) the Internal Revenue Service shall have ruled or the Congress of the United States shall have provided, that such purchases of obligations by the Pension Funds pursuant to this Agreement shall not constitute prohibited transactions or otherwise adversely affect the qualified status of the Pension Funds for the purposes of the Internal Revenue Code of 1954, as amended, (vii) the (iii) a State law containing provisions with respect to the legal status of the Pension Funds and their Trustees' responsibilities, satisfactory to such Trustees, shall have been enacted and shall be effective, (iv) ~~the City~~

(Comment:Ransom demand, we will break the law and buy $860 million of speculative NYCity bonds if you will,under 7eiii,give us carte blanche authority for a state law negating financial liability as fiduciaries, an updated medieval indulgence considered now to be a congressional prerogative to grant, AND under 7 e vi give us a license to break US protective laws 26 USC 401 & 503. Response by Congress: PL 94-236.) (Pledged increase NYC bonds to 56% of assets.).

4.On Dec.5 & 13,1975 IRS Commissioner Lurie's letters of approval, even before the bill was drafted, and the first $184 million TRS purchase of NYCity bonds at above market price after selling corporate bonds at a $30 million loss. Comm. Lurie refused to approve of further purchases.

5. Therefore and thereafter there were no NYCity bond puchases. To remedy the situation and meet Trustees demand Congress passed PL 94-236 March ;9,1976. Then and not a day before were NYCity bond purchases resumed by TRS Trustees.

6. In the House debate reported in the Congressional Record p.H 1397 March 1,1976 .

a. Mr. Ullman, Chairman of the House Ways and Means Comm. urging passage of his Comm bill later known as PL 94-236:

"...it is absolutely essential to pass this legislation in order to make it possible for the original agreement to work."

b. Mr. Rangel, member of the House Ways and Means Comm., same ref. "The IRS issued letters of intent which the pension funds relied on as assurance that bond purchases would not constitute prohibited transactions. It was then determined that Congressional action would be necessary to avert the loss of tax qualified status of the pension funds."

c. Mr. Conable, member of the House Ways and Means Comm., same ref. "...it is clear that performance under the agreement on the part of the pension funds would raise a number of very serious questions regarding whether or not the 'exclusive benefit' or 'prohibited transaction' rules of the IRS had been violated."

Conclusion: The scenario above proves conclusively that NO NYCity bond purchases would have been made by TRS Trustees after Oct. 1975 BUT FOR IRS Comm. Lurie's letters of approval and PL 94-236,

Federal Defendants erred in stating p. 16, that"Plaintiff's claim with respect to retroactivity is without basis." "In short the law changed nothing retroactively."

The very opposite is true.

The Hearing on the bill was held on Feb. 23,1976. The law was passed on March 19,1976 with effective date August 20,1975. It is important to note that the "Agreement" which demanded passage of the bill was signed November 26,1975. Why wasn't the effective date of the bill which deals exclusively with the "Agreement" the same date as the "Agreement"? Answer: to remove the penalty for wrongdoing and deny judicial review. As follows:

1.Between Aug. 20,1975 and Oct. 20,1975 TRS Trustees bought $275 million MAC bonds paying 11% interest. To do this they sold $295 million of corporate bonds at a loss of $20 million. Both the sale and purchase were in violation of 26 USC 401 & 503 then in effect.If these law violations were approved by IRS then IRS also violated the law, and would still be subject to judicial review and reversal under 5 USC 702/706. The $20 million loss was never reported in the press nor by the Trustees. MAC purchases were made prior to the Agreement, of Nov 26,975.

2.However in the "Agreement" the Trustees agreed to exchange the 11% Macs for 6% Macs, as other equal creditors did not do, at a loss of interest amounting to $188 million, in 14 years. An illegal transaction, prohibited by law.

3.On Dec. 5 & 13,1975 TRS Trustees with the approval of IRS Comm. Lurie sold $214 million A & AA quality corporate bonds at a loss of $30 million (Plaintiff's App. Exhibits M 1,2) and purchased $184 million NYCity bonds above market price. The NYCity bonds were rated Caa, prohibited for purchase by federal law by any National or FDIC bank. The TRS NYCity bond purchases were made while 26 USC 401/503 were in effect and therefore IRS approval was illegal and subject to judicial review under 5 USC 702/706.

If the illegal backdating is validated then judicial review might be denied. Note Federal Defendant's argument to this effect in footnote page three of his brief.

The NYState Law repealing the 146 year old prudence rule for City Pension Trustees by waiving fiduciary financial liability for them was passed in Dec. 1975. By dating PL 94-236 back to Aug. 1975 an attempt is made to date back their liability coverage.

DEnial of judicial review is a violation of plaintiff's due process and equal justice fifth Amendment rights.

Only these five Pension fund members are denied such judicial review.

CITATION

> 4. So far as equal protection is concerned, the validity of retroactive alteration of a tax scheme must be determined, as in the case of any other tax, by ascertaining whether the thing taxed falls within a distinct class which may rationally be treated differently from other classes. P. 145.
>
> 6. A tax is not necessarily in violation of the due process clause because retroactive. In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation. P. 146.

Welch v Henry 305 US 145, 146.

F.D. Citation US v Hudson 299 US 498 does not apply because it deals with accounting practices that effect taxable property, facts completely remote from this case.

F.D. Citation, 1st Natl. Bank Dallas v U.S. 420 F 2d 725, does not apply because it deals with an effort to recover retroactively federal excise taxes.

Backdating changed a great deal

1. It removed the remedy for wrongdoing under the "Agreement" by blocking challenge to:
   a. Exchange of 11% MAC bonds for 6% MAC bonds with loss of $188 million in interest, not applicable to other equal creditors.
   b. The waiving by TRS of amortization calls on NYCity bonds they held, not applicable to any other bond holders who were all equal creditors.
2. It impaired vested rights provided by 26 USC 401/503 since 1940.
3. It impaired state fiduciary liability contract obligations in violation of Constitution Article 1 Section 10 by "Agreement" Paragraph 7 e iii (above).
4. It denied judicial review in violation of Article 1 Section 9 of the Constitution of the United States of America.

CITATION

Bauer v Acheson 106F. Supp 446,450,451.

An "ex post facto law" is a statute which in its relation to offense, or its consequences, alters situation of accused to his disadvantage. U.S.C.A.Const. art. 1, § 9.

"Due process of law has never been a term of fixed and invariable content."[16] Due process does not require a judicial hearing,[17] but merely a procedure in which the elements of fair play are accorded. Essential elements of due process are notice and an opportunity to be heard before the reaching of a judgment,[18] but the particular procedure to be adopted may vary as appropriate to the disposition of issues affecting interests widely varying in kind.[19]

A bill of attainder includes any legislative act which takes away the life, liberty, or property of a particular named or easily ascertainable person or group of persons because the legislature thinks them guilty of conduct which deserves punishment;[5] and an ex post facto law is a statute which " 'in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage.' "[6] But a

4. Cummings v. Missouri, 4 Wall. 277, 323, 71 U.S. 277, 323, 18 L.Ed. 356.

5. United States v. Lovett, 328 U.S. 303, 315–317, 66 S.Ct. 1073, 90 L.Ed. 1252.

6. Thompson v. Utah, 170 U.S. 343, 351, 18 S.Ct. 620, 623, 42 L.Ed. 1061; Cummings v. Missouri, supra, 4 Wall. at pages 325–330; Ex parte Garland, 4 Wall. 333, 377, 71 U.S. 333, 377, 18 L.Ed. 366.

STANDING

Federal Defendants err in asserting that Plaintiff lacks standing vs Federal Defendants.

In contradiction to F.D. argument Plaintiff meets the requirements of Flast v Cohen 392 US 83:

Nexus 1: Under Article 1 Section 8 of the Constitution the taxing power of Congress requires that "all duties, imports & excises shall be uniform throughout the USA." IRS Commissioners letters of approval for NYCity bond purchases by TRS was not a uniform administrative tax act causing injuries in fact/to plaintiff as Acting Trustee P.brief/ p.12, specified in brief pp 21-24 by violating the standards applicable to 600,000 other pension systems registered under 26 USC 401 & 503 and in violation of Federal laws on bond investment for National and FDIC banks.

Nexus 2.: Said IRS acts of approval were/discriminatory against invidiously the property interests of plaintiff & Pensioner Minority and in violation of their due process and equal justice, fifth Amendment rights.

Zone of interest met by issue of enforcement of 26 USC 401/503; 5 USC 702/706;Federal Securities law 17a & plaintiff's challenge to constitutionality of PL 94-236 by violation of/fifth Amendment. Article 1,Sections 8,9,10 & the Singleton v Wolff 428 US 106

Court has remedial power to redress injuries under 5 USC 702/706 Bowker v Morton541 F 2d 1349. Also Naves v Penn 426 F. Supp. 830.

Plaintiff as Acting Trustee or alternatively as Private Attorneys General has met the requirements for Standing established in Simon v E. Ky. Welfare 426 US 3841; Data Processing v Camp 397 US 150; Warth v Seldin 422 US 504 on pages 21-24 of Plaintiff's brief.

Alternatively standing is conferred by 5 USC 702.

Title 5 USC 702 : "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof.(PL89-554 9/6/66, 80 Stat.392)." Plaintiff was wronged and adversely affected by the actions of Alvin Lurie acting in his capacity as Asst. Commissioner, Employer Plans & Exempt Organizations, IRS, when on Dec. 5 & 13,1975 he gave approval to Defendant TRS trustees to purchase $182 million NYC bonds in violation of 26 USC 401a & 503b, RR 69-494 and RR 70-131, C.B.135. Plaintiff is entitled to judicial review and relief under 5USC 702/706(3) and is asking that Dec. 5 & 13 1975 approval be set aside as unlawful , arbitrary, capricious, an abuse of discretion and in violation of the plaintiff's constitutional rights as follows:

Equal protection and due process under the Fifth Amendment were denied : by failing to apply the exclusive benefit rule;by not prohibiting transactions where cost exceeded fair market price; by approving the sale of $212 million of highly rated, varied corporate securities at a loss of $30 millions and the purchase of $182 million of speculative, Moody rated Caa bonds; by failing to heed the federal diversity standard for a prudent investor by raising NYC employer obligation holdings by TRS to 5 6% of total assets; by reducing liquidity and increasing risk; by discriminating against the TRS retirees to the advantage of employed TRS members; by using a lesser standard for the five NYC employee pension funds than applied to other tax exempt pension funds; by using a lesser standard than that established by the Controller of the Currency under 12 USC 24 for investment by National Banks and State Bank members of the Federal Reserve System; by using a lesser standard than that of the Federal Deposit Insurance Corp.; by substituting political expediency for federal law.

The assertion by Federal Defendants Pages 10&11 that Simon v E. Ky is a case similar to the present action is entirely without basis in fact. The injuries complained of in Simon v E. Ky. were speculative and involved the "encouragement" of denial of service by tax exempt hospitals . The injuries suffered by present plaintiff were experienced in fact and the direct result of the Dec. 5 & 13,1975 IRS letters of approval by Asst. Comm. Lurie.

F.D. page 11 asserts "the plaintiff here has not suffered any injury " because he continues to receive his $3000 annual pension. Other kinds of serious injuries were suffered by plaintiff and Pensioner Minority:a.Diminished value of lifetime savings/investment in TRS by 1975

1.$50 million loss in Aug-Dec/sales of corporate securities to buy city obligations.

2.$100 million loss by purchase of NY City bonds above market price.

3.$188 million loss in interest by exchange of 11% MAC bonds for 6%.

4.Undeterminable, dubious value of approx. $500 million NYCity bonds

b.Increased risk by increase NY City bonds from 6% to 56.5% of total assets.

c.Destruction of full funding by insolvent investments.

d.Ending diversity and liquidity and lowering quality of investment portfolio.

e.Threat to security, dignity and peace of mind in old age.

f. No provision to cover threatened loss.

None of these injuries would have been inflicted but for the acts of Comm. Lurie and PL 94-236.

F.D. notion corresponds to the assurance given a person whose house has burned down that he has experienced no injury because he was not burned. There is a need for recognition of qualitative as well as quantitative differences in injuries.

The Federal Defendants statement on page 12 that "there is no basis in the record for asserting that such injury was caused by the actions of the Federal Defendants," is without basis in fact and contradicted by Plaintiff's Complaint (and Amended Complaint) paragraphs 10,11, & 12 and Exhibits and further evidenced by PL94-236, Treasury Department approved Nov. 26,1975 "Agreement" (Affidavit Exhibit I, p2) paragraph 7(e) "The obligations of the Pension Funds to purchase bonds persuant to this paragraph 7 shall be subject to agreement to and fulfillment of such agreements by all parties referred to in this Paragraph 7 and shall be conditioned upon each of the followingfacts being true on the date of each such purchase... 7(e)(vi) the IRS shall have ruled or the Congress of the U.S. shall have provided , that such purchases of obligations by the Pension Funds persuant to this Agreement shall not constitute prohibited transactions or otherwise adversely affect the qualified status of the Pension Funds for the purposes of the Internal Revenue Code of 1954 as amended. (Underlining added.) The purchases were conditioned on and actually completed only after receipt of Asst. Comm. Lurie's Dec. 5 & 13,1975 letters of approval. Furthermore when those IRS letters refused to rule that future NYC bond purchases would not result in violation of the exclusive benefit rule 401a, TRS trustees made no further NYC bond purchases until after the President signed PL 94-236 into law in March 1976.

Federal Defendants statement on page 12 line 33 that "...under the Agreement that is at the root of the Plaintiff's complaint, the trustees made a substantial committment to

purchase MAC bonds regardless of whether the federal ruling or legislation was obtained, "Agreement paragraph 7(f)," See is speculative and inaccurate. A pledge to buy $150 million MAC bonds is not the equivalent to an $860 million purchase pledge; if the IRS had obeyed federal laws 401a & 503b and disapproved the $182 million NYC bond purchase in Dec. 1975 then I should, on the same basis have had to disapprove of the TRS pledged $150 million MAC bonds, purchase.

Federal Defendant assertion on p.13, clipping below is without merit:

> "the complaint suggests no substantial likelihood that victory in this suit would result" in plaintiff's receiving the redress of any injury he may have suffered. *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra,* 426 U.S. at 45. The only possible action the Federal Defendants could take in implementing the relief plaintiff seeks would be to revoke the tax-exempt status of the pension fund.

Under 5 USC 706 the Court may "set aside" IRS approval of the Dec. 5 & 13, 1975 purchases as unlawful, arbitrary or contrary to constitutional right. He "may compel agency action unlawfully withheld." In addition IRS revocation of tax exempt status has produced extraordinary reforms , many years overdue, in the Teamsters Pension Fund as indicated by report in NY Times of July 19,1977 below:

'76 I.R.S. LETTER CITES PENSION FUND ABUSE

Charging Teamster Mismanagement, Agency Threatened Tax Status

By JO THOMAS

Special to The New York Times

WASHINGTON, July 19—The Internal Revenue Service revoked the tax-exempt status of the $1.4 billion Central States pension fund of the teamsters' union last year because it had found wide-ranging abuses in the handling of assets and benefit payments, Congressional officials disclosed today.

Administration of the pension fund for the years 1965 through 1974 showed it was "not operated for the exclusive benefit of the beneficiaries," the revenue service said in a letter to the president of the International Brotherhood of Teamsters, Frank E. Fitzsimmons. The letter, dated June 25, 1976, was obtained today by The New York Times.

The letter, whose contents had not been disclosed previously, provided the documentary basis for intensive examination of the teamsters pension fund by various Federal agencies. The fund, whose full title is the Central States, Southeast and Southwest Areas Pension Fund, covers 450,000 persons and is one of the nation's largest private pension plans. It has been the target of an 18-month investigation in which the revenue service and the Labor and Justice Departments are cooperating.

Published reports have alleged that many of the fund's loans are in default, and that some loans have been made to organized crime figures.

Although the I.R.S. revoked the pension fund's tax-exempt status in June 1976 it granted relief to the fund's employer and employee participants. It also gave the fund itself a series of temporary extensions of tax exemption while negotiations to reform the fund continued. For practical purposes, the extensions had the effect of leaving the fund's tax status unchanged.

The fund's tax-exempt status was restored in April after all of the pension fund's former trustees had resigned under pressure from the tax agency and from Ray Marshall, the Secretary of Labor. Management of the fund's assets is now being transferred to private concerns.

Mr Marshall told the Senate Permanent Subcommittee on Investigations today that the fund's assets were now "in secure hands," but that no one yet knew their true worth.

In the 1976 letter revoking the pension fund's tax-exempt status, the I.R.S. charged that loans had been made without adequate security, at lower than prevailing interest rates, and against the advice of professional advisers retained by the fund.

The I.R.S. also charged that funds were invested without requiring reasonable terms of repayment and were given to "individuals known to be unworthy of trust."

Asked today about published reports that organized crime figures had made money from the fund, Mr. Kelley said, "The press reports are accurate."

Mr. Kelley said 70 percent of the fund's loan portfolio was in real estate, an amount that he called "extraordinary." "Five or ten percent would be usual," he added. He said loans had been made with no physical inspection of real estate and with no appraisals. He confirmed that collateral for one loan consisted of gambling chits, which he said, are not legally binding for any debt.

As part of an agreement reached by the fund, the I.R.S. and the Labor Department, the fund's trustees will continue to administer pension benefits, but will give up all control over the assets; Mr. Marshall said today.

In the future, the Equitable Life Assurance Society will handle all investments in real estate east of the Mississippi River. The Victor Palmieri Company will handle all real estate investments in the West. Equitable, Lazard Freres & Company, the Crocker Investment Management Company and the Mercantile National Bank of Dallas will manage the fund's securities.

The I.R.S. also found abuses in the handling of benefits. In its 1976 letter to Mr. Fitzsimmons, which was signed by Charles S. Miriani, the Chicago district director, the I.R.S. charged that recordkeeping was poor and benefits were not paid in accordance with the plan's terms.

Senators Henry M. Jackson, Democrat of Washington, Charles H. Percy, Republican of Illinois, and Sam Nunn, Democrat of Georgia, asked Mr. Marshall repeatedly about any criminal investigations he might have under way.

Mr. Marshall was reluctant to answer questions about specific cases, but he said his department would proceed in civil and criminal cases to see that punishment would result from the mishandling of funds and that restitution would be made, where possible.

These two appropriate and available remedies would redress the injuries and restore the viability of TRS . The fact that the City has paid off the moratorium note holders without recourse to the pension funds or banks recently althogh the amount was one billion dollars indicates further that redress is available and provides evidence of the justifiability of the case.

Federal Defendants p.14 footnote urging rejection of claim on the basis of subject matter jurisdiction is invalid:

a. Simon v E. Ky. has been discussed above.

b. Califano v Sanders 430 US 99 involves the right to appeal a seven year old final decision on Social Security made by the Sect. of HEW. The facts not even remotely like those in this case.

c. It is necessary to distinguish between petitioners challenging revenue tax laws and those challenging the failure of IRS to carry out its responsibility in supervising the operation of protective regulatory laws under Treasury Dept. Administration. Federal Laws such as 401a, 503, and ERISA establish and legally mandate specific standards, in a given state of facts, for pension funds, designed to protect the property and social welfare of pensioners. IRS Asst. Commr Lurie failed to carry out his duty and acted arbitrarily in plaintiff's case at issue. Federal Defendants footnote page 10 quotes Flora v U.S. 362 U.S.145,176(1960) relative to jurisdiction. Flora challenged under Section 1346, not raised by this plaintiff. Case involves a tax refund and has no bearing on plaintiff's case. Similarly Du Pont Glore Forgan v ATT is a tax rebate suit and not applicable.

Plaintiff's suit does not involve the revenue of the Government. Plaintiff is not su ing Federal Defendants for damages. Plaintiff's suit involves the ministerial functions of the IRS. Plaintiff is challenging failure of Asst. Comm Lurie IRS, to carry out his duty to obey the federal law mandates of 401a and 503b which set up prohibited transaction rules which apply to more than 600,000 pension plans and the exclusive benefit for employee rules which he ignored in his Dec. 5 & 13,1975 approval letters to TRS.

If Federal Defendants footnote citations were valid and governed the issues raised by plaintiff only TRS trustees would have standing to challenge the failure of IRS to prevent TRS trustees from violating federal laws 401 & 503, a situation known as reductio ad absurdum.

Regarding the F.D. page 10 footnote, "But see Jackson v Statler Foundation," my understanding of the dictum is that a pro se case involving minority discrimination and an unequal justice claim requires the use of different criteria by the Court than those used in a regular adversary proceeding. Obviously no pro se appellant can begin to compete with a professional law expert.

I beleive that the Supreme Court was implying that the subsonic voice of the Constitution and the law always audible to judges should be tuned in and turned up in such pro se cases, of which this is one.

Plaintiff prays that the arguments and the substance of the issues presented be measured by the criteria of Jackson v Statler F. and the criteria of Carey v Population Services and that the decision of the Court below will be reversed.

CONCLUSION

Plaintiff has established valid grounds for granting standing.

Plaintiff has established valid grounds for declaring PL 94-236 unconstitutional.

The order of the District Court dismissing the complaint vs Federal Defendants should be reversed and a temporary injunction to prevent the enforcement of PL 94-236 should be granted.

Respectfully submitted,

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